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IN THE

Supreme Court of the United States

October Term, 1964

No. 896

FRANK D'ANGIOLILLO, a/k/a FRANK BUICK and LOUIS D'ANGIOLILLO,

Petitioners,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

Supreme Court of the United States

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No.

FRANK D'ANGIOLILLO, a/k/a FRANK BUICK,
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UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The petitioners, Frank D'Angiolillo and Louis D'Angiolillo, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above entitled case on January 15, 1965.

A. The Opinion Below

The opinion of the United States Court of Appeals for the Second Circuit in this case has been reported in F. 2d (1965), and is set forth in Appendix A to this petition.

B. Jurisdiction

The judgment of the United States Court of Appeals for the Second Circuit was entered on January 15, 1965, affirming the judgment of conviction of the United States District Court for the Southern District of New York, entered May 6, 1964. The jurisdiction of this Court is invoked under Section 1254(1) of Title 28, United States Code, and Rule 19 of the Supreme Court Rules, to review by writ of certiorari the judgment of the United States Court of Appeals for the Second Circuit.

C. Questions Presented

1. Where an informer, in the employ of the government during trial, is the moving factor and an integral participant in the criminal transaction, does the government or the trial court have an obligation to call him as a witness?
2. Do seven flagrantly illegal searches and seizures require dismissal of the indictment in this Court's exercise of supervisory authority over the administration of criminal justice?
3. In a case where but one government witness, a police officer, can establish the guilt of the accused, should that witness' relevant grand jury testimony be disclosed for cross-examination?

D. Constitutional Provisions and Rules

The constitutional provisions and rules involved are:

1. Amendment IV, United States Constitution
2. Amendment V, United States Constitution
3. Amendment VI, United States Constitution
4. Rule 6(e), Federal Rules of Criminal Procedure.

All of the foregoing are set forth in Appendix B, annexed to this Petition.

E. Summary Statement

A four count indictment was filed charging each petitioner with three substantive violations and a conspiracy to violate Section 174 of Title 21, United States Code. After a four-day jury trial, both petitioners were found guilty on each count. Petitioner Frank D'Angiolillo was sentenced to imprisonment for seven years, and petitioner Louis D'Angiolillo was sentenced to imprisonment for five years.

The moving force behind all of the substantive transactions was the informer, who arranged all of the meetings for the transactions, and who engaged in the only incriminating conversations with petitioner Frank D'Angiolillo, all such conversations having been by telephone, audited by a police officer who testified to the contents of these conversations at trial.

On trial of the indictment, this police officer was the only government witness who could and did give evidence sufficient to establish the essential elements of the crimes charged. Upon request by petitioner's counsel for disclosure of all relevant grand jury testimony of this witness, the trial court examined the witness' grand jury testimony and, finding no inconsistencies between the grand jury testimony and the witness' testimony on trial, refused to direct disclosure of any of the grand jury testimony. Two days later, on the third day of trial, after six other government witnesses testified,[1] and shortly before the government

1. These witnesses testified to incidental surveillance. However, absent the activities of the informer as testified to by the police officer, the guilt of petitioners could not have been established.

concluded its case, the prosecutor called the trial court's attention to a substantial conflict between the witness' grand jury testimony and her testimony on trial. Without reexamining the grand jury testimony, the trial court directed disclosure of that small portion of the grand jury testimony to petitioners only, and gave them the privilege of recalling the witness at the end of the government's case.

At the conclusion of the investigation, and after the arrest of both petitioners, state and federal officers, pursuant to a pre-existing plan, engaged in warrantless searches of petitioner Frank D'Angiolillo's two stores in New York City, his apartment in New York City, his house in Paramus, New Jersey, the apartment of his former wife and his daughter in New York City, the home of petitioner Louis D'Angiolillo in Staten Island, New York, and the apartment in which petitioners' parents lived in New York City. Pre-trial motions to supress any evidence were granted at the commencement of the trial, but pre-trial motions to dismiss the indictment were denied.

F. Reasons for Granting the Writ

I

Under the circumstances of the flagrant mass searches and seizures herein, the exclusionary rule is not a sufficient deterrent and a more stringent sanction, such as dismissal of the indictment, should be fashioned by this Court.

The opinion of the court below (Appendix A, *infra*), clearly recognizes the "flagrant violation of the rights of not only the defendant but of several persons not accused

of any crime"[2] as a consequence of the seven illegal searches which "reflect considerable planning".[2] In affirming the judgments of conviction, the court below opined that the law calls only for exclusion. However, the court below did go further and directed the prosecuting office to

> "send copies of such parts of the record as are relevant to the searches to the Secretary of the Treasury and to the Police Commissioner of the City of New York so that appropriate action may be taken by those who are ultimately responsible for the conduct of the officers concerned. We also direct the United States Attorney to advise us of what action, if any, is taken by the Secretary and the Commissioner." Appendix A, at 7a, *infra*.

Petitioners, recognizing that "the basic postulate of the exclusionary rule . . . is . . . to prevent, not to repair . . . to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it", *Elkins* v. *United States*, 364 U.S. 206 (1959) at 217, submit that exclusion may be a sufficient curb when the illegal activity is confined to a single incident. We suggest, however, that the excesses disclosed by this record require more. It is urged that the court below "has so far departed from the accepted and usual course of judicial proceedings", Rule 19, *Supreme Court Rules*, and that the conduct of the law enforcement officers has evidenced such a callous indifference and calculated disregard for constitutional guarantees that a more stringent sanction should be fashioned by this Court in the exercise of supervisory authority over the administration of criminal justice.

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2. Quoting from the opinion below. Appendix A, at 6a, *infra*.

II

It is essential to a fair trial, in the circumstances herein, that an obligation be imposed upon the government or the trial court to call the informer as a witness.

Some eight years ago, in a case in which an informer "helped to set up the commission of the crime and . . . was present at its occurrence", *Roviaro* v. *United States*, 353 U.S. 53 (1957) at 61, this Court stated that

> "[p]etitioner's opportunity to cross-examine [the] Police Officer . . . and [the] Federal Narcotics Agent . . . was hardly a substitute for an opportunity to examine the man who had been nearest him and who took part in the transaction." *Id.* at 64.

Recent cases in this Court, *Lopez* v. *United States*, 373 U.S. 427 (1963) (concurring opinion of the Chief Justice), *Massiah* v. *United States*, 377 U.S. 201 (1964), in the United States Courts of Appeals, *United States* v. *Cimino*, 321 F. 2d 509 (2d Cir. 1963) (dissenting opinion of Judge Waterman), *cert. den.*, 375 U.S. 967, *United States* v. *Williamson*, 311 F. 2d 441 (5th Cir. 1962), and in the district courts, *United States ex rel Coffey* v. *Fay*, 234 F. Supp. 543 (S.D.N.Y. 1964), *United States* v. *Ramsey*, 220 F. Supp. 86 (E.D. Tenn. 1963), have started to plumb the limitations on the government's use of informers and their obligations with respect thereto.

In this case the informer, still employed by the government during trial,—an addict with a long series of criminal convictions, and with two pending narcotic charges,—was the instrumentality by which the criminal transactions were initiated, and he was the means by which the government obtained the inculpatory statements from petitioner Frank O'Angiolillo, audited by the police officer who testified to the statements at trial.

On this record, the concern expressed in the concurring opinion in *Lopez* v. *United States, supra,* was justified and, in fact, prophetic. Petitioners respectfully suggest that, in light of the record herein and the increasing reliance by law enforcement officers on informers to initiate criminal transactions, this Court grant the petition to consider the permissible limits within which the government may utilize an informer, and the sovereign's obligations with respect thereto.

III

In a case where government is obliged to rely on a single witness to establish the elements of the crime charged, that witness' entire grand jury testimony, relevant to his trial testimony, should be disclosed to the accused.

Rulings with respect to disclosure of grand jury testimony are almost as numerous as the courts of appeals that have considered the problem. The United States Court of Appeals for the Second Circuit has determined that "[t]he proper time for inspection is at trial, when any inconsistencies discovered may be used for cross-examination." *United States* v. *Hernandez,* 290 F. 2d 86 (2d Cir. 1961) at 89. In a prosecution tried to a court without a jury, however, the court below has countenanced reexamination by the trial court after the fact. *United States* v. *Giampa,* 290 F. 2d 83 (2d Cir. 1961), at 85-86.

In this case, the only portion of the grand jury testimony of the single witness against petitioners which was disclosed under direction of the trial court was that portion selected by the prosecutor, and this was not done until two days after the witness testified. The trial court's initial examination of the grand jury testimony was, in effect, no

examination at all, for "under the pressures of conducting a trial", *Pittsburgh Plate Glass Co.* v. *United States*, 360 U.S. 395 (1959) at 410, the trial court did not pick out a most glaring inconsistency and, after that inconsistency was revealed to the trial court by the prosecutor, the trial court did not reexamine the grand jury minutes.

> "A complete failure by the trial court to inspect the minutes of the grand jury testimony by the Government's major witness cannot be remedied by inspection by the appellate court, at least in a jury case, where the possible effect of a searching cross-examination cannot be appraised as perhaps it may be by a trial judge sitting alone. *United States* v. *Hernandez*, supra at 89."

Petitioners submit that the procedures utilized here with respect to disclosure of grand jury testimony, in both the trial court and the court below, give full support to the views expressed in the dissenting opinion of Mr. Justice Brennan in *Pittsburgh Plate Glass Co.* v. *United States*, *supra* at 409-410.

> "The reasons for permitting defense counsel rather than the trial judge to decide what parts of that testimony can effectively be used on cross-examination are certainly not less compelling than in regard to the FBI reports involved in *Jencks*. For grand jury testimony is often lengthy and involved, and it will be extremely difficult for even the most able and experienced trial judge under the pressures of conducting a trial to pick out all of the grand jury testimony that would be useful in impeaching a witness. His task should be completed when he has satisfied himself what part of the grand jury testimony covers the subject matter of the witness' testimony on trial, and when he has given that part to the defense."

Only such a prophylactic rule, easy of comprehension and application, can resolve the differences in lower court decisions, and make identity of application a realizable fact.

CONCLUSION

For the reasons hereinabove set forth this petition for a writ of certiorari should be granted.

Respectfully submitted,

JONATHAN L. ROSNER,
RALPH L. PLISKIN,
Attorneys for Petitioners

APPENDIX A

Opinion of the United States Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 130—September Term, 1964.

(Argued October 9, 1964 Decided January 15, 1965.)

Docket No. 28849

UNITED STATES OF AMERICA,

Appellee,

—v.—

FRANK D'ANGIOLILLO, a/k/a Frank Buick and LOUIS D'ANGIOLILLO,

Appellants.

Before:

LUMBARD, *Chief Judge,*
HAYS and ANDERSON, *Circuit Judges.*

Defendants appeal from convictions in the United States District Court for the Southern District of New York, John M. Cannella, J., for violation of the federal narcotics laws, 21 U.S.C. §§173, 174 and conspiring to violate such laws.

Affirmed.

MARTIN R. GOLD, Assistant U.S. Attorney, New York, N.Y. (Robert M. Morgenthau, United States Attorney, Southern District of New

York, and Neal J. Hurwitz, Assistant U.S. Attorney, New York, N.Y., on the brief), *for appellee.*

JONATHAN L. ROSNER, New York, N.Y. (Ralph L. Pliskin, New York, N.Y., on the brief), *for appellants.*

LUMBARD, *Chief Judge*:

Frank and Louis D'Angiolillo appeal from convictions and sentences of seven and five years respectively in the District Court for the Southern District of New York for violating the federal narcotics laws, 21 U. S. C. §§173, 174, and conspiring to violate such laws.[1] The defendants seek reversal principally on the grounds that the trial court erred in not either directing the government to call its informer as a witness or calling him as a witness of the court and that certain unlawful searches made at the time the defendants were arrested required dismissal of the indictment. We affirm the convictions.

The government's principal witness was Detective Robbie Williams of the New York City Police Narcotics Bureau. According to her account, her first contact with the defendants was on December 9, 1962, when Frank D'Angiolillo twice called the home of Claude Norman Greene, a police

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1 The seven and five-year sentences were imposed for each of three substantive counts and one conspiracy count, the sentences to run concurrently. The three substantive counts were based on narcotics sales on December 9, 1962 and January 23, 1963 and on Louis' actual possession and Frank's constructive possession of narcotics on the day of their arrest, March 20, 1963.

informer. Detective Williams answered each time, and when Greene took the telephone he held the receiver so that she could hear them arrange a meeting. At the meeting, near 176th Street and Grand Concurose in the Bronx, Greene and Detective Williams received from Louis D'Angiolillo a package which contained approximately 100 grams of heroin.

There were other telephone calls from Frank and meetings with Louis during the following months, but on only one occasion did Detective Williams meet Frank. She and Greene met him on January 22, 1963 at his clothing store near 117th Street and Pleasant Avenue. He told them that he could not arrange a sale at that time because he was moving into a dry cleaning establishment across the street; when Detective Williams told him that she wanted "four piece," he said that he would call Greene's home at 7:30 the next morning.

Detective Williams testified that she did receive a call at Greene's home at 7:30 the following morning and that she recognized Frank's voice. They arranged a meeting to which she went alone.[2] As before, she received from Louis a package containing approximately 100 grams of heroin.

The defendants were arrested on March 20, 1963. Louis was arrested in his taxicab, which he had used to deliver heroin to Detective Williams. The arresting officers seized the taxicab trip ticket and a package containing some 400 grams of heroin. Frank was arrested in front of his dry

2 As noted later in this opinion, Detective Williams testified before the grand jury that she went to this meeting with Greene.

cleaning shop. No narcotics were found in searching his two stores, or in searching the homes of the defendants and of members of their families.

Motions to suppress the evidence seized in searching the stores and homes were made prior to trial. A hearing was held before Judge Cannella, who ruled that the searches of the residences were unlawful but reserved decision as to the search of Frank's clothing store. He ruled at trial that the latter search also was unlawful. None of the evidence taken in these searches was received in evidence.

At trial, Frank did not testify, but Louis testified in his own behalf. Greene was not called as a witness by either side.

The defendants first argue that the court should have directed the government to call Greene as a witness or itself have called him. We have considered this problem in a number of cases, e.g., *United States* v. *White*, 324 F. 2d 814, 816 (1963); *United States* v. *Cimino*, 321 F. 2d 509, 512 (1963), cert. denied, 375 U. S. 967, 974 (1964); *United States* v. *Holiday*, 319 F. 2d 775 (1963). The rule emerging from these and earlier decisions is that, where the informer's testimony may be relevant to the defense, the defendant is entitled to his name, to such information as the government may have concerning his whereabouts,[3] and to reasonable cooperation in securing his appearance. How-

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3 See our opinion in *United States* v. *Comulada*, filed today. Of course, where the informer or his family might be endangered by public disclosure, the trial court in its discretion may direct that the information be revealed only to counsel, as was done in this case.

ever, the government is not required to call an informer or "special employee" as its witness.

Greene was readily available, being confined in the New York City Penitentiary Prison, and Judge Cannella offered to have him served with a subpoena. He also offered to permit defendants to interrogate Greene privately before deciding whether to call him as a witness and told them that they could question him as a hostile witness if such he proved to be. The defendants chose not to call him but instead advised the court to do so after the government rested its case without calling Greene. There is no basis whatever for their claim that there was error in the government's failure and the court's refusal to call Greene.

The defendants cite no case holding that the court is required to direct the government to call the informer or to call him as a witness of the court,[4] and, at least on the facts of this case, we see no reason for imposing such a duty. Accepting Detective Williams' testimony at trial, which the jury must have believed, Greene's role was limited to introducing her to the defendants and accompanying her to the first meeting with Louis. His testimony, though relevant, presumably would have been only cumulative.

The defendants' second claim of error is that certain unlawful searches required dismissal of the indictment even though nothing taken in the searches was received in evidence. Frank's home in Paramus, New Jersey, and Louis'

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4 The defendants' citation of the concurring opinion of Chief Justice Warren in *Lopez* v. *United States*, 375 U. S. 427, 441 (1963), gives no support to their argument. The Chief Justice was concerned with a different problem—the use of incriminating recordings obtained by an informer without calling the informer himself as a witness.

home on Staten Island were searched at approximately the time that the arrests were made; searches of the homes of the defendants' parents and Frank's wife and of an apartment used by Frank were made later in the day. The searches appear to have been conducted principally by federal agents, but New York City police officers participated at least in the searches of Frank's store and Louis' home. Although the searches reflect considerable planning, no search warrant was obtained, and their illegality must have been apparent to anyone possessing the slightest familiarity with constitutional limitations on police activity.

Since the searches were made nearly two years after the Supreme Court's decision in *Mapp* v. *Ohio*, 367 U. S. 643 (1961), it is difficult to see what legitimate end the officers thought might be furthered. Whether those responsible were incompetent or incredibly careless or were actually indifferent to the constitutional guarantees is of relatively little importance; whatever the reason, the result was the flagrant violation of the rights of not only the defendants but of several persons not accused of any crime. Those whose duty it is to enforce the law must obey the law themselves. Violations such as those in this case are at best short-sighted. Their immediate effect may be to jeopardize investigations and prosecutions which otherwise might be fruitful. The ultimate, and more serious, effect is a loss of public respect for the law and law enforcement agencies.

We do not believe, however, that dismissal of the indictments would be an appropriate sanction. The convictions were obtained solely on the basis of lawfully acquired evidence. The law calls only for exclusion, and we do not think that the public interest would be served by requiring

more than this in the exercise of our supervisory power over the administration of criminal justice. Instead, we direct the United States Attorney to send copies of such parts of the record as are relevant to the searches to the Secretary of the Treasury and to the Police Commissioner of the City of New York so that appropriate action may be taken by those who are ultimately responsible for the conduct of the officers concerned. We also direct the United States Attorney to advise us of what action, if any, is taken by the Secretary and the Commissioner.

The defendants also raise numerous objections to the court's evidentiary rulings and instructions. We find no error in Judge Cannella's evidentiary rulings. He refused to allow disclosure to the jury of Greene's address, but he did offer to make it available to the defendants' counsel. Judge Cannella believed that Greene's family, who still lived at his home, would be endangered by public disclosure of the address. We think that this resolution of the conflicting interests of disclosure and protection of the informer's family lay well within the trial judge's discretion.

The jury was instructed that Greene was available to both parties and that they could not draw an inference against either party from the fact that he was not called as a witness. This instruction was proper.[5]

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5 It would generally be enough to say that the jury, having before it the facts with regard to the availability of the witness and his relation to the parties, may draw such inferences as they choose. *United States* v. *Comulada*, —— F. 2d —— (2 Cir. 1965), decided today; *United States* v. *Cotter*, 60 F. 2d 689, 692 (2 Cir. 1932) (L. Hand, *J.*). The charge in the instant case, however, is proper where it is clear that the witness is readily available to both sides. 2 Wigmore, Evidence §288 (3d ed. 1940).

We also find no error in the court's instruction with respect to the proof necessary for conviction under §§173 and 174. Judge Cannella correctly charged as to the presumption under §174 of illegal importation and of the defendant's knowledge thereof. In addition, he explained that "possession" as used in these sections includes effective control of the narcotics as well as actual possession, and he repeatedly stressed the element of knowledge required for guilt.

Finally, defendants contend that they should have been given the minutes of Detective Williams' testimony before the grand jury. Grand jury minutes need be made available to the defense only if the trial court finds inconsistencies between the testimony of a witness at trial and before the grand jury. *United States* v. *Giamva*, 290 F. 2d 83 (2 Cir. 1961). Judge Cannella initially found no inconsistency, but the government subsequently pointed out an inconsistency in the testimony of Detective Williams: She had told the grand jury that she went with Greene to the second meeting with Louis D'Angiolillo, but she testified at trial that she went alone. This portion of the minutes was made available to the defendants, and they were given an opportunity to recall Detective Williams for further cross-examination. Since, upon reading the minutes, we find no additional inconsistencies, we find that the rights of the defendants were fully protected.

We have examined the other claims of error made by the defendants and find them to be without merit.

APPENDIX B

Constitutional Provisions

AMENDMENT IV, UNITED STATES CONSTITUTION

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

AMENDMENT V, UNITED STATES CONSTITUTION

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

AMENDMENT VI, UNITED STATES CONSTITUTION

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have previously been ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses

in his favor, and to have the Assistance of Counsel for his defense."

RULE INVOLVED

Rule 6(e), Federal Rules of Criminal Procedure

"Rule 6. The Grand Jury

* * * * *

(e) Secrecy of Proceedings and Disclosure. Disclosure of matters occurring before the grand jury other than its deliberations and the vote of any juror may be made to the attorneys for the government for use in the performance of their duties. Otherwise a juror, attorney, interpreter or stenographer may disclose matters occurring before the grand jury only when so directed by the court preliminarily to or in connection with a judicial proceeding or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury. No obligation of secrecy may be imposed upon any person except in accordance with this rule. The court may direct that an indictment shall be kept secret until the defendant is in custody or has given bail, and in that event the clerk shall seal the indictment and no person shall disclose the finding of the indictment except when necessary for the issuance and execution of a warrant or summons."

APPENDIX C

Judgment of Affirmance by United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the fifteenth day of January one thousand nine hundred and sixty-five.

Present:

HON. J. EDWARD LUMBARD,
Chief Judge,

HON. PAUL R. HAYS,
HON. ROBERT P. ANDERSON,
Circuit Judges.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

FRANK D'ANGIOLILLO, a/k/a "FRANK BUICK",
and LOUIS D'ANGIOLILLO,
Defendants-Appellants.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgments of said District Court be and they hereby are affirmed.

A. DANIEL FUSARO
Clerk

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 896

FRANK D'ANGIOLILLO, A/K/A FRANK BUICK, AND LOUIS D'ANGIOLILLO, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Vol. II, 121–128; Pet. App. 1–8) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on January 15, 1965 (Vol. II, 129; Pet. App. 11). The petition for a writ of certiorari was filed on February 10, 1965. The jurisdiction of this Court is invoked under 28 U.S. 1254(1).

QUESTIONS PRESENTED

1. Whether the trial court properly refused to compel the government to call as its witness an informer who had been made available to the defense for private consultation and for use as a witness.

2. Whether petitioners were entitled to have the indictment dismissed because they and others had been subjected to unlawful searches, even though the illegally seized articles had been suppressed as evidence by the district court before trial.

3. Whether the trial court properly refused to order the grand jury testimony of a government witness turned over to the defense at the trial.

STATEMENT

A four-count indictment returned in the United States District Court for the Southern District of New York charged that petitioners (who are brothers) violated, and conspired to violate, the Narcotic Drug Import and Export Act, 21 U.S.C. 174 (Vol. I, 1–4). After a trial by jury in April 1964, petitioners were found guilty as charged. They were sentenced to imprisonment for seven (Frank D'Angiolillo) and five (Louis D'Angiolillo) years.[1] The convictions were affirmed on appeal (Vol. II, 121–128, 129; Pet. App. 1–8, 11).

The pertinent facts may be summarized as follows:

1. In June 1962, a federal narcotics agent in New

[1] Frank was sentenced to concurrent terms of imprisonment of seven years on each of the substantive counts, and to a concurrent five year term on the conspiracy count. Louis was sentenced to concurrent terms of imprisonment of five years on each of the counts.

York City arrested one Claude Norman Greene (Vol. II, 35). Shortly thereafter, Greene told the agent that petitioner Frank D'Angiolillo had been telephoning him almost every other morning since December, 1961, soliciting his order for narcotics (Vol. II, 34–35). Greene was subsequently introduced to one Robbie Williams, an undercover policewoman attached to the narcotics section of the New York City Police Department.

On the morning of December 9, 1962, Williams, together with federal and New York City narcotics agents, met Greene at his home in the Bronx (Vol. II, 2–3, 27–28). At about 8:00 a.m., Frank D'Angiolillo telephoned and asked for "Boomie" (*i.e.*, Greene) (Vol. II, 4–5, 50–52; see Vol. II, 28). Greene held the receiver in such a position that both he and Williams were able to hear the conversation (Vol. II, 5). After ascertaining that "everything was all right", Frank asked Greene "how many did he want" (Vol. II, 5–6). Greene replied, "four dresses." When Frank inquired as to the amount of money Greene had, Greene said that he had "twenty" (Vol. II, 6). Frank said that he would call back in a few minutes. At about 8:30 a.m., Frank telephoned Greene and told him to meet the cab "at the usual place" (Vol. II, 6, 52; see Vol. II, 29).

Shortly thereafter, Greene and Williams went to a nearby location. A taxi cab driven by Louis D'Angiolillo pulled up and Greene and Williams entered the cab (Vol. II, 7–8, 29). After introductions, Greene told Louis that Williams would be "picking up the stuff from now on" (Vol. II, 8). When Williams

asked for the four ounces, Louis said that it was under the seat (Vol. II, 8). Williams reached down and picked up a package of heroin (Vol. II, 8–9; see Vol. II, 30, 53). Williams then gave Louis a bag containing $2,000 in official government funds (Vol. II, 8).

On January 22, 1963, Greene and Williams had a conversation with the two defendants in Frank's clothing store. Williams ordered four "pieces". Frank said that the price would be the same as before "2,000 for four pieces no matter how much it was adulterated" (Vol. II, 11). At about 7:30 a.m. of the following day, Frank telephoned Greene's home, spoke with Williams and said he would call back (Vol. II, 12, 54; see Vol. II, 31). Shortly thereafter, a narcotics agent observed Louis enter a coffee shop which Frank had entered a short time before (Vol. II, 54). At about 8:00 a.m., Frank telephoned Williams from a booth outside the coffee shop and told her to meet the cab at the usual place in about ten minutes (Vol. II, 13, 55; see Vol. II, 31). Frank returned to the coffee shop and, shortly thereafter, Louis left the shop. Williams met and entered Louis' cab (Vol. II, 13, 31). When Louis said that the stuff was under the seat, Williams reached down and picked up a package of heroin (Vol. II, 13; see Vol. II, 31–32, 55). She then gave Louis a package containing $2,000 in government funds (Vol. II, 13).

On March 19, 1963, Frank telephoned Greene at his home and told him that he did not have any goods on hand that day, but that if he wanted anything that he, Frank, would call back on the following morning (Vol. II, 15). At about 7:00 a.m. the next day, Frank tel-

ephoned Greene, and, after ascertaining that Greene would be "ready" about 8:30 a.m., said that he would have Louis "go to the doctor" later that day (Vol. II, 16, 64). Shortly thereafter, a narcotics agent observed Louis and Frank meet and enter a toy store together. When they emerged, Louis was carrying a small brown package which he tossed into the front seat area of his taxi. Louis entered the taxi and drove to the same location where he had met Williams and Greene before (Vol. II, 58–60). In the meantime, Frank telephoned Greene that the cab was waiting for him (Vol. II, 17, 65). Shortly thereafter, narcotics agents arrested Louis and seized a package of heroin from inside the taxi (Vol. II, 59–60). Frank was arrested at his store later that morning.

2. Greene did not testify at the trial. At a bench conference during the trial, petitioners requested the court to order the government to call Greene as a witness (Vol. II, 65–66). The court declined but offered to have Greene produced for the defense (Vol. II, 66). The following proceedings transpired (Vol. II, 67–68):

> The COURT: No, I don't see any obligation on the Government to call him as a witness, and I will assist the defense in any way they want even to the point of ordering him produced and giving the defendants' counsel an opportunity to talk to him before they make up their mind whether they are going to use him or not, and not make this fact known to the jury at all.
>
> They may then after they talk to the informer either produce him or request his appearance or they may decide not to use him, in

which event, of course, the jury would never even know that they spoke to him.

Mr. ROSNER [Defense Counsel]: With your Honor's permission, I would like to consider your Honor's decision in this regard.

The COURT: What I am going to do is this: I am going to make this witness available for you now because I think he is still here. I did sign a writ again today. I don't know whether he is gone, but if he is still here, you may consult with him this afternoon and let me know tomorrow morning what your decision is on the matter.

Mr. ROSNER: Might I inquire at whose instance the writ was issued?

* * * * *

Mr. GOLD [Government counsel]: Ad testificandum, and it was issued by me because it was obvious from a study of this case * * * that this was a man who might possibly be called by the defense and should be available to them if they wished and might possibly still be called by the Government, depending upon what defense goes in.

The COURT: I will direct the Marshal, as soon as we excuse the jury today, to make available the witness to the defendants' lawyers, both of them, and then tomorrow they will report to me whether or not they wish to use him or whether they don't.

That is a decision they will have to make after they speak to him.

Later in the trial, the court said that it would assist the petitioners in making available any witness, including Greene, and that it had previously made Greene available to defense counsel for consultations

(Vol. II, 77). Mr. Rosner replied that he "did not last evening, nor did [he] this morning, nor [did he] intend to in the future, speak to Claude Norman Greene" (Vol. II, 78). After further discussions, the court said (Vol. II, 81):

> Now, if they want to call a witness, they are at perfect liberty to do so. I am giving you the advantage in this case, which the ordinary man does not get, and that is to talk to the man and find out whether you want to use him or not. That is a decision you will have to make.
>
> I hold that in the context of this case, he is available to both sides.
>
> I have made him available to both sides. Either side can call him and if he is not called at the end of this trial, I am going to instruct this jury that they can make no inferences as against or for either side, because he is equally available to both.

ARGUMENT

1. Before trial, the district court suppressed as evidence articles and papers seized by federal and local law enforcement agents in warrantless searches of a number of buildings, including Frank's store, petitioners' residences and the residences of other persons. It is undisputed that the evidence introduced against petitioners at the trial was lawfully obtained and unconnected with the subsequent unlawful searches and seizures. Nor is it even claimed that the indictment was based on the fruits of the illegal searches.

Petitioners nevertheless argue for the adoption of a sanction "more stringent" than the exclusionary rule

upon violation of Fourth Amendment rights; they suggest dismissal of the indictment. In short, petitioners seek absolute immunity from prosecution because of official misconduct which in no way prejudices their trial. But that is not the law: where Fourth Amendment rights have been violated the appropriate remedy is exclusion at the trial of the illegally obtained evidence. *E.g., Weeks* v. *United States,* 232 U.S. 383, 393; *Wong Sun* v. *United States,* 371 U.S. 471. Here, the court of appeals directed the United States Attorney to transmit relevant portions of the record to the Secretary of the Treasury and the Police Commissioner of New York City and to report to the court the action taken by those ultimately responsible for the misconduct of the officers concerned (Pet. App. 7).[12] That seems to us a proper accommodation of the public interest in deterring official lawlessness without defeating the ends of justice.

2. There is no substance to petitioners' contention (Pet. 6–7) that the trial court erred in refusing to direct the government to call as its witness the special employee Greene. The government is under no duty to call as its witness an informer or special employee in an effort to establish its case against an accused, especially when, as here, the informer merely serves to introduce the parties to a transaction and his tes-

[12] The Federal Bureau of Narcotics is presently conducting an investigation into the matter. A report of its findings and of any action taken thereon shortly will be communicated to the court of appeals.

timony would be cumulative.[2] To be sure, where the testimony of the informer or special employee might be relevant or helpful to the defense or needed in order to secure a fair trial, the government has a duty to disclose his identity to the accused. *E.g.*, *Roviaro* v. *United States*, 353 U.S. 53, 61–65; *Rugendorf* v. *United States*, 376 U.S. 528, 534–535; *United States* v. *Holiday*, 319 F. 2d 775, 776 (C.A. 2), and cases cited; *United States* v. *Cimino*, 321 F. 2d 509, 512 (C.A. 2), certiorari denied, 375 U.S. 967, 974. But there can be no complaint on that score in the present case. The government disclosed Greene's identity and obtained a writ of *habeas corpus ad testificandum* to insure his presence at the trial. Greene was present and available for consultation or call by petitioners and the court offered to permit the petitioners to question Greene privately before deciding whether to call him as a witness and told them that they could question him as a hostile witness if he proved to be hostile (Vol. II, 66–68, 81). Under the circumstances, the government fully complied with its

[2] Petitioners misstate the record in asserting that the informer was the "moving force behind all of the substantive transactions", and "engaged in the only incriminating conversation with petitioner Frank D'Angiolillo" (Pet. 3, 6). It was Frank who did the telephoning to get the orders. As to the first transaction, Williams overheard the conversation and Williams made the actual purchase. As to the second transaction, where arrangements were made in Frank's store, Williams was present and placed the order and Williams received the telephone calls and made the actual purchase. The third transaction was not completed.

duty of disclosure, and the district court correctly refused to direct the government to call Greene as its witness.

3. At the conclusion of Williams' direct examination, the prosecutor turned over to the defense various reports made by the witness which qualified under 18 U.S.C. 3500, and submitted Williams' grand jury testimony to the court for an *in camera* examination (Vol. II, 20). After a recess, the court announced that it had read the grand jury testimony and found "no discrepancies" (Vol. II, 20). Near the conclusion of the government's case-in-chief, the prosecutor, at a bench conference, stated that he had just learned that there was a discrepancy between Williams' trial and grand jury testimony—that Williams had testified before the grand jury that Greene had accompanied her on the second narcotic transaction with Louis whereas at the trial she testified that "she went there alone" (Vol. II, 69–70). When counsel for Frank D'Angiollillo said that the disclosure came "a little bit late in the trial * * * to make full use of [it]", the prosecutor stated that Williams was available to testify should petitioners desire to have her recalled, that he would be willing to stipulate to the inconsistency, and that Williams was mistaken when she told the grand jury that Greene had accompanied her on the second narcotics transaction (Vol. II, 72–73). The court stated that the pertinent part of Williams' grand jury testimony was available to the petitioners, and that the petitioners were at liberty to have Williams recalled as a witness (Vol. II, 73–74). The court declined to make the entire grand jury tes-

timony of Williams available to the defense (Vol. II, 74). Counsel for Frank D'Angiolillo declined the proposed stipulation and said that he would "let the matter stand just as it is now," and that he stood by his previous statement that the disclosure came "a little bit late in the trial to use [it] to effectiveness" (Vol. II, 74).

There is no merit to petitioners' contention (Pet. 7–9) that the trial court erred in refusing to disclose Williams' entire grand jury testimony. It is settled that the question whether grand jury minutes should be disclosed is one committed to the sound discretion of the trial judge, and that, in the absence of some "particularized need" for disclosure, it is not error for the court to decline production. *Pittsburgh Plate Glass Co.* v. *United States,* 360 U.S. 395, 398–401; *United States* v. *Procter & Gamble,* 356 U.S. 677, 683; *United States* v. *Socony-Vacuum Oil Co.,* 310 U.S. 150, 234. No such showing was made here. It was proper for the trial judge to examine the grand jury minutes *in camera,* and to decline production when he found no inconsistencies. *E.g., United States* v. *Giampa,* 290 F. 2d 83 (C.A. 2); *United States* v. *Hernandez,* 290 F. 2d 86 (C.A. 2). With respect to the one discrepancy called to the court's attention, the court's offer to disclose the pertinent part of Williams' grand jury testimony and recall Williams was sufficient. The suggestion that other inconsistencies might have been overlooked by the trial judge is fully answered by the court of appeals, which read Williams' grand jury testimony and found "no additional inconsistencies" (Pet. App. 8).

CONCLUSION

For the reasons set forth, we respectfully submit that the petition for a writ of certiorari should be denied.

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